

TERRI J. JACKSON)	
Claimant)	
VS.)	
)	
CARTER PETROLEUM PRODUCTS)	
Respondent)	
AND)	
)	
FARMLAND MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

Docket No. 234,073

This matter comes on for hearing pursuant to Claimant's Application for Preliminary Hearing to pursue additional medical treatment for her right shoulder, particularly with Dr. Satterlee. Respondent has declined to provide such treatment as Claimant's injury is over ten years old and Claimant has been at maximum medical improvement for years. They also argue that Claimant settled her claim in Missouri for an amount which would exceed any benefits she was entitled to in Kansas and argue that Respondent should be credited for compensation benefits paid in Missouri. Finally they argue that Claimant's current need for medical treatment is due to an intervening injury in that Claimant sustained a fracture to her

dominate left wrist in August or September 2007 which required casting. As a result of that treatment, Claimant was forced to overuse her right upper extremity necessitating the current need for treatment.¹

In the October 3, 2008, Preliminary Decision, Judge Roberts held that claimant failed to prove her present need for medical treatment was due to her May 12, 1998, accident. Instead, the Judge held claimant's present need for medical treatment was due to an intervening accident, the 2007 left wrist injury, as claimant did not require additional medical treatment to her shoulder until then. Consequently, the Judge denied claimant's request for medical treatment for her right shoulder pain.

Claimant contends Judge Roberts erred. Claimant argues she initially requested, and was denied, additional right shoulder treatment shortly after her December 2003 settlement. She asserts the intensity of her right shoulder symptoms wax and wane depending upon use. Moreover, she maintains the left wrist injury only temporarily caused an increase in her right shoulder symptoms as those symptoms returned to their baseline once the wrist healed. Finally, claimant contends all the medical evidence in the record indicates claimant's present need for medical treatment is related to the May 12, 1998, accident. Accordingly, claimant requests the Board to reverse the October 3, 2008, Preliminary Decision and order the respondent to refer claimant to an orthopedic surgeon of claimant's choice.

Conversely, respondent and its insurance carrier (respondent) request the Board to dismiss this appeal for lack of jurisdiction as claimant has allegedly failed to raise any jurisdictional issue as set forth in K.S.A. 44-534a. In the alternative, respondent asks the Board to adopt the Judge's finding that claimant failed to prove her present need for medical treatment is related to her May 1998 accident and, thereby, affirm the Preliminary Decision. In addition, respondent adopts the arguments it made when this claim last came before the Board.² Thus, respondent also contends (1) claimant is not entitled to receive medical compensation without first applying a credit (of at least \$25,000) due to the Missouri settlement, which respondent maintains far exceeds the benefits that may be awarded in this Kansas claim and (2) claimant's present request should not be addressed in a preliminary hearing as the parties have participated in a prehearing settlement

¹ Preliminary Decision (Oct. 3, 2008) at 1.

² Respondent appealed a May 21, 2008, Temporary Order entered by Administrative Law Judge Robert H. Foerschler. On that appeal, it was determined Judge Foerschler had exceeded his jurisdiction by entering that Order before the time expired that the Judge had given the parties to submit their written arguments. Consequently, the May 21, 2008, Temporary Order was set aside and the claim remanded to the Judge to address the issues presented.

conference and claimant has been found to be at maximum medical improvement numerous times, released from medical care numerous times, and rated.

The issues before the Board on this appeal are:

1. May claimant utilize the preliminary hearing procedure to present this request for medical treatment?
2. Does the Board have jurisdiction for this appeal?
3. Did claimant prove her present need for medical treatment is related to her May 12, 1998, accident?
4. Did the Judge err without first giving respondent credit for the benefits it paid in the Missouri workers compensation claim?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds:

In May 1998, respondent employed claimant as a manager of a Taco Bell. Claimant injured herself on May 12, 1998, while trying to lift a 35- to 50-pound box onto a shelf six feet above the floor. The parties agree the accident arose out of and in the course of claimant's employment with respondent.

Claimant ultimately underwent two surgeries on her right shoulder to repair two labral tears and a discectomy and fusion in her thoracic spine. Claimant was released from medical treatment in late 2001.

In December 2003, claimant settled and closed the Missouri workers compensation claim she had filed for this accident. According to that settlement, claimant received \$150,000 for the permanent total disability she sustained from the injuries to her neck, thoracic spine, and right shoulder. The settlement specifically provided that none of the money being paid claimant was for future medical expense and that the Kansas workers compensation claim, which claimant also filed for this accident, remained open.³

At the May 15, 2008, hearing before Judge Foerschler, claimant testified that at the time of the December 2003 settlement she was still experiencing a lot of pain in her right

³ The settlement also recited that \$22,174.79 had been paid in temporary total disability benefits and \$102,940.98 in medical expenses.

shoulder and elbow, and experiencing numbness and tingling in her hand.⁴ Moreover, claimant testified that doctors were recommending ongoing medical treatment at the time of her settlement. And since settling the Missouri claim, the pain in claimant's shoulder and neck has not resolved.

Claimant testified she has not sustained any additional trauma to her right shoulder or neck since settling the Missouri claim in December 2003. But she did fracture her left wrist in late 2007, which caused her to use her right arm and shoulder more which, in turn, increased her right shoulder pain.

Claimant was not working when she settled her Missouri claim in 2003. But sometime after 1999 (when Dr. Beall initially released her from shoulder treatment) claimant worked part-time for three months managing an acquaintance's 7-Eleven store. In 2005, which was after the second shoulder surgery in which the doctor operated on claimant's shoulder and biceps, claimant returned to work at the 7-Eleven store. Because she knew the owner, claimant was accommodated and she did not have to stock the coolers, sweep or mop.

Claimant fractured her left wrist in the latter part of 2007 when she hit it on the handle of a lawnmower. Claimant testified that accident occurred in September and that she wore a cast on her left wrist for six weeks. And although she had some difficulty expressing it, claimant indicated her left wrist injury only temporarily increased her right shoulder symptoms. Moreover, claimant indicated that, regardless of the 2007 left wrist fracture, depending upon her activities her right shoulder pain was worse now than at the time of her December 2003 settlement.

In short, according to claimant, anything she did after the second shoulder surgery could "set it off and make it hurt worse than other times."⁵ Claimant described how everyday activities affected her right shoulder symptoms:

It still bothers me because I have everyday chores at my house. Folding laundry, it hurts me; raising up above and putting clothes up in the closet hurts; making the bed; walking the dog; trying to keep the yard work done; anything. Carrying in groceries, I can't carry in that stuff. I have to make sure they put it in several bags. I mean, I can go spend \$30, \$40 on groceries and come back with 12 bags of nothing.⁶

⁴ Hearing Trans. (May 15, 2008) at 13, 14.

⁵ *Id.* at 34.

⁶ *Id.* at 35.

In October 2007 claimant began working part-time as a cashier for Sam's Club. In that job claimant pulls merchandise across a scanner and places the merchandise in the customer's shopping cart. When her right shoulder symptoms flare, Sam's Club moves her to either a cashier station where she can pull merchandise with her left arm or the position of greeter.

Claimant presently receives benefits from Social Security, which are adjusted according to her wages at Sam's Club. The record is unclear whether those are disability benefits or some other benefits.⁷

At this juncture, there is limited expert testimony addressing the issue of whether claimant's present need for medical treatment is related to her May 1998 accident. Dr. Michael J. Poppa, who examined claimant in February 2008 at her attorney's request, wrote a February 26, 2008, report concluding, in part: (1) claimant's physical examination was consistent with right shoulder strain/rotator cuff tendonitis/possible labrum tear and myofascitis involving the right cervical paraspinal muscles, right trapezius muscle, right upper-mid thoracic paraspinal muscles and aggravation of preexisting status-post right shoulder condition, non-operated neck and upper back; (2) claimant's right shoulder, neck and upper back require treatment; and (3) claimant's present right shoulder, neck and upper back conditions are causally related to her May 12, 1998, accident.

Dr. Poppa's report also indicates claimant sought medical treatment from St. Joseph Hospital Emergency Department in August 2007, which would precede the left wrist fracture should claimant be correct in believing the fracture occurred in September 2007. Nonetheless, that same report indicates claimant began experiencing increased pain in her *already painful shoulder* after breaking her left hand at the end of August or September.

At the May 2008 hearing, respondent introduced the January 12, 2005, medical report prepared by Dr. P. Brent Koprivica, who apparently examined claimant in January 2005 at her attorney's request. That medical report indicates Dr. Koprivica also examined claimant in December 2001.

In the January 2005 report, Dr. Koprivica indicated that despite two surgeries to treat an extensive SLAP lesion in her right shoulder, claimant continued to experience severe ongoing pain in the right shoulder girdle. And even though the doctor believed claimant had reached maximum medical improvement, Dr. Koprivica concluded claimant would indefinitely need chronic pain management intervention. Finally, the doctor noted claimant was taking Hydrocodone and Amitriptyline in January 2005.

⁷ See *Id.* at 29, 30.

1. May claimant utilize the preliminary hearing procedure to present this request for medical treatment?

Claimant is requesting medical treatment under K.S.A. 44-534a, the preliminary hearing statute. Respondent objects to this being treated as a preliminary hearing because claimant's accident occurred more than 10 years ago and at various times she has been released from medical treatment and rated. In addition, respondent asserts that the Missouri claim, which was premised upon the same accident, has been settled.

The undersigned finds claimant appropriately utilized the preliminary hearing procedure to make her request for medical treatment. There has been neither a full hearing nor award in this claim as contemplated by K.S.A. 2007 Supp. 44-523. In addition, the preliminary hearing statute specifically provides that a worker may pursue medical treatment and temporary total disability benefits under that procedure. K.S.A. 44-534a provides, in part:

(a)(1) After an application for a hearing has been filed . . . the employee or the employer may make application for a preliminary hearing . . . on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. . . .

(a)(2) Such preliminary hearing shall be summary in nature

In short, respondent's objection to claimant utilizing the preliminary hearing proceeding is without merit.

2. Does the Board have jurisdiction for this appeal?

Respondent requested the Board to dismiss this appeal for lack of jurisdiction as claimant has allegedly failed to raise a jurisdictional issue. The undersigned disagrees. The issue of claimant's present need for medical treatment is a jurisdictional issue under K.S.A. 44-534a, which provides in part:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

The issue of whether claimant's right shoulder condition is directly attributable to the May 12, 1998, accident gives rise to the jurisdictional issue of whether her injury and need for treatment arose out of and in the course of her employment with respondent.

Furthermore, the allegation of an intervening accident raises a certain defense that goes to the compensability of the injury. The term “certain defense” has been construed to mean defenses that go to the compensability of the injury.⁸

In conclusion, the Board has jurisdiction under K.S.A. 44-534a to review preliminary hearing findings regarding whether an employee’s need for medical treatment was related to an accident that arose out of and in the course of employment.

3. Did claimant prove her present need for medical treatment is related to her May 12, 1998, accident?

The undersigned finds claimant’s present need for medical treatment is related to her May 1998 accident. Claimant’s testimony is uncontradicted that she has experienced chronic right shoulder pain since her surgeries to repair the labral tears. Moreover, claimant’s testimony is credible that the pain she was experiencing in 2003, when she settled her Missouri claim, has somewhat worsened as well as her testimony that her left wrist fracture only temporarily affected her right shoulder.

In addition, the medical reports from Dr. Koprivica and Dr. Poppa support claimant’s position. In 2005, which was well before the 2007 left wrist fracture, Dr. Koprivica noted claimant was taking Hydrocodone and Amitriptyline and, more importantly, noted claimant would need pain management indefinitely for the chronic pain in her shoulder. And in 2008, Dr. Poppa examined claimant and concluded her ongoing shoulder symptoms were related to her May 1998 accident.

As the undersigned finds it is more probably true than not that claimant’s present need for medical treatment is related to her May 1998 accident, the October 3, 2008, Preliminary Decision should be reversed.

4. Did the Judge err without first giving respondent credit for the benefits it paid in the Missouri workers compensation claim?

Not every issue or finding may be appealed to the Board from a preliminary hearing order. And as indicated above, the Board’s jurisdiction to review preliminary hearing orders is limited to the issues of whether the worker sustained an accidental injury, whether the injury arose out of and in the course of employment, whether the worker provided timely notice and timely written claim, and whether other certain defenses apply. Respondent’s request that it be given a credit for the benefits that were paid in settlement of claimant’s Missouri workers compensation claim is not such an issue.

⁸ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

Respondent, however, is not without recourse. Respondent may preserve the issue for the full hearing on the claim and for the final award.

In short, the Board does not have jurisdiction from a preliminary hearing order to review the credit issue that respondent has raised.

Based upon the above, the undersigned reverses the Judge's finding that claimant failed to prove her present need for medical treatment was related to her May 1998 accident. Accordingly, this matter should be remanded to the Judge to address claimant's request for authorization to consult an orthopedic surgeon for her right shoulder pain.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned reverses the October 3, 2008, Preliminary Decision and finds that claimant's present need for medical treatment is directly related to her May 12, 1998, accident. Furthermore, the claim is remanded to the Judge to address, consistent with the findings above, claimant's request for authorization to consult an orthopedic surgeon. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
John B. Rathmel, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge

⁹ K.S.A. 44-534a.